California Pastoral and Agricultural Company v. Madera Canal and Irrigation Company[1] decides that a right is acquired only to the use of a reasonable quantity of the water, not to the full amount taken and wasted.

The question could hardly have arisen if our system of jurisprudence possessed a logical and consistent theory of prescription, such as existed in the Roman Law. Because our law on this subject is stated in the form of statutes of limitations, we are inclined to reason, in cases involving questions like the present, that since a right of action accrued for the unlawful taking more than five years ago, it is now barred by mere lapse of time. It is true that such lapse of time extinguishes the remedy in the cases of torts and contracts. But it is not true where the acquisition of title is concerned. There the important matter is the possession or use by the person claiming title. In other words, mere lapse of time never bars titles, unless accompanied by adverse possession or use. The only question, therefore, as the Supreme Court holds, should have been what was the extent of the defendant's use for more than five years?[2]

Though there are some material differences between the easement of light and the easement of diverting water from a stream, it is interesting to note that the English House of Lords finally held, after much difference of opinion on the part of inferior tribunals, that an easement of light by prescription was measured, not by the light actually enjoyed for the prescriptive period, but by the extent reasonably required for the building in respect to which the easement was claimed.[3]

O. K. M.

WATER AND WATER COURSES: IRRIGATION STATUTES.—In 1905, North Dakota, South Dakota and Oklahoma, and in 1907, New Mexico, adopted "irrigation codes" which are practically copies of the so-called "Bien Code," which was prepared by Mr. Morris Bien of the United States Reclamation Service, and which is based principally on statutes adopted by Idaho and Utah in 1903. The code has recently been before the Supreme Courts of New Mexico[1] and South Dakota.[2]

The New Mexico case deals with a statutory provision[3] necessitating the approval of the State Engineer before making a change in the point of diversion of a canal. It is held that

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[1] (Jan. 15, 1914) 47 Cal. Dec. 116.
[2] Langdell, Equity Pleading, Secs. 120-125.
[3] Colls v. Home and Colonial Stores, Limited, (1904) A. C. 179.
[1] Pueblo of Isleta v. Tondee, (1913) 137 Pac. 86 (New Mexico).
[2] St. Germain Irrigating Co. v. Hawthorne Ditch Co., (1913) 143 N. W. 124 (S. Dak.)
[3] Chap. 49, New Mexico Laws of 1907, Sec. 45.

the provision applies only to appropriations initiated under the 1907 act, and not to those existing at the date of its passage. Chief Justice Roberts dissented, holding that all appropriations are subject to the sections construed, and his opinion seems to be supported by both the administrative practice and by the Courts in other States having such legislation.[4]

The South Dakota case interprets that part of the code[5] dealing with the adjudication of water rights. It is therein provided that "when any such suit has been filed the Court shall direct the State Engineer to make or furnish a complete hydrographic survey of such stream system" and that the costs of such surveys shall be charged against the parties in proportion to the water right allotted. The Court held that such provisions are "void as tending to deprive individuals of property rights and property, by way of costs and expenses, without due process of law." The section in question is practically the same as Sec. 4620 of the Code of Civil Procedure of Idaho, which has been upheld on the grounds that the constitution does not prohibit the legislature from providing for such surveys and their use as evidence and the prorating of the costs thereof by the trial Court.[6]

It is also held that Section 46 of the South Dakota act, providing that, when a party entitled to the use of water fails to beneficially use all or any portion of the waters claimed by him for a period of three years, such unused waters shall revert to the public, is void as to a riparian owner, but valid as to mere appropriators. It is said "A riparian right to use such waters of a flowing stream cannot be lost by disuse." This point is especially noteworthy as there exists a strong tendency to adopt legislation of this nature in the vain hope of abolishing riparian rights. Such a clause was incorporated in a recent act adopted by the California Legislature, the operation of which has been suspended by the referendum.[7] As shown in this case, the courts have uniformly relied upon the doctrine that use does not create the riparian right, and disuse cannot destroy or suspend it. It, therefore, seems futile to attempt to legislate against it. The California Supreme Court, however, has very recently said by way of dictum, "It may well be that there is room for and even need for legislation which will require riparian proprietors to exercise their irrigation rights in the use of water within a limited period, or to be decreed to have waived their rights."[8]

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[4] New Cache La Poudre Co. v. Water Supply Co., (1902) 29 Colo. 469, 68 Pac. 781; Farmers' etc. Co. v. Gothenburg etc. Co., 73 Neb. 223, 102 N. W. 487.

[5] Chap. 180, South Dakota laws of 1907, Sec. 16.

[6] Boise, etc. Co. v. Stewart, (1904) 10 Idaho 38, 77 Pac. 25.

[7] Chap. 586, Calif. Stat. 1913, Section 11.

[8] Miller & Lux v. Enterprise Canal & Land Co., (Dec. 20, 1913) 47 Cal. Dec. 1; rehearing granted Jan. 19, 1914.

It is also held in the case under comment that the complaint is insufficient in that it "fails to state any kind of a cause of action upon any possible theory." The complaint had been drawn on the theory that under the 1907 act adverse claims to water could be adjudicated without a showing of actual conflict or wrongful diversion. The court distinguishes between an action of this kind and "one to determine adverse claims of title to real estate." The better and general rule seems to be that the assertion of an adverse claim is sufficient and actual interference need not be pleaded.[9]

A. E. C.

WILLS: CHARITABLE GIFTS: PRECATORY AND SECRET TRUSTS.—Those who desire to leave more than one-third of their property for charitable purposes in spite of the prohibitions of section 1313 of the Civil Code, will doubtless welcome the recent assurance from the Supreme Court of California[1] that a legacy or devise with a recommendation to the donee to dispose of the subject matter of the gift to charities does not come within the terms of the above mentioned section. From the standpoint of both English and American authorities, it seems to be well established that a precatory or recommendatory disposition may be made which will be perfectly valid notwithstanding the restrictions of the various statutes of a mortmain character. In the case referred to the testatrix had stated in her will that she desired, and was fully confident, that the legatee would use the property for charitable purposes in accordance with her wishes, but had also expressly provided that she imposed no trust or limitation in respect to the legacy. Although in the earlier cases slight expressions were held sufficient to create a trust, the more recent authorities stand for the rule, followed in the principal case, that the disposition will not be deemed by way of trust unless upon a reasonable construction of the entire will it is evident that the testator intended to make a binding and imperative direction upon the legatee.[2] It is immaterial that the purpose of this recommendatory form of gift is to avoid the prohibitions of a mortmain statute.[3] Since no legal or equitable obligation rests

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[9] 1 Wiel, Water Rights in the Western States, 729; 3 Kinney Irrigation and Water Rights, 2764.

[1] Estate of Purcell, (Jan. 26, 1914) 47 Cal. Dec. 210.

[2] In re Diggles, (1886) L. R. 39 Ch. Div.. 253; In re Oldfield, (1904) 1 Ch. 549; In re Whitcomb, (1890) 86 Cal. 265, 24 Pac. 1028; Estate of Marti, (1901) 132 Cal. 666, 61 Pac. 964; Kauffman v. Gries, (1903) 141 Cal. 295, 74 Pac. 846; Estate of Mitchell, (1911) 160 Cal. 618, 117 Pac. 774.

[3] O'Donnell v. Murphy, (1911) 17 Cal. App. 625, 120 Pac. 1076; Fairchild v. Edson, (1897) 154 N. Y. 199, 48 N. E. 541; Lomax v. Ripley, (1855) 3 Sm. & Giff. 48; Carter v. Green, (1857) 3 K. & J. 591.